**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JAMES P. MILLER**<br>Claimant | ) | |
| VS. | ) | |
| **DIAMOND EVERLEY ROOFING**<br>Respondent | ) | Docket No. 1,009,366 |
| AND | ) | |
| **BUILDERS ASSN. SELF-INS. FUND**<br>Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier request review of the March 30, 2006 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on August 2, 2006.

### APPEARANCES

Neil A. Dean of Topeka, Kansas, appeared for the claimant. Wade A. Dorothy of Lenexa, Kansas, appeared for respondent and its insurance carrier.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

The Administrative Law Judge (ALJ) awarded claimant a 90.5 percent work disability based upon a 91 percent task loss and a 100 percent wage loss less a 5 percent preexisting impairment. The ALJ further appointed the claimant's physician to provide pain management.

The respondent requests review of the nature and extent of claimant's disability as well as whether the ALJ erred in authorizing a specific doctor to manage claimant's

ongoing pain complaints. Respondent argues claimant should be limited to his functional impairment because he did not attempt offered accommodated employment that would have paid more than 90 percent of his pre-injury wage.

Claimant argues that because of the financial hardship caused by his injury he lost his home and car. And although he did not think he could perform the offered accommodated job he would have attempted it if he had transportation to get to work. Claimant further argues it was bad faith for respondent to fail to pay the minimum functional impairment and if it had done so, as requested by claimant, he would have purchased a vehicle in order to attempt the offered accommodated work. Consequently, claimant requests the Board to affirm the ALJ's Award.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It was undisputed claimant suffered accidental injury to his back on February 12, 2003, while tilting a wooden pallet so a pallet fork could lift it. As claimant was performing that activity the pallet fork fell backwards twisting and pulling him down. Claimant immediately experienced a snap and burning sensation in his low back.

Claimant was provided an extensive trial of conservative treatment which failed to provide relief for his low back pain. Ultimately, Dr. Glenn M. Amundson, a board certified orthopedic surgeon, performed surgery on claimant's back on November 18, 2004. The claimant underwent a two-stage procedure. Initially, an anterior fusion with interbody cages and bone morphogenic protein was performed at the L4-5 and L5-S1 levels. Then a posterior fusion with instrumentation from L4 to S1 was performed.

While engaged in physical therapy after his surgery the claimant had an incident while lifting that resulted in a significant increase in his back and leg pain. Consequently, Dr. Amundson ordered an MRI and an EMG nerve conduction study which indicated L4-5 and S1 radiculopathies on the left side as well as evidence of peripheral polyneuropathy involving the sensory and motor nerves in the right and left lower extremities.

After additional physical therapy, Dr. Amundson concluded claimant was at maximum medical improvement as of the last office visit on July 20, 2005. Dr. Amundson provided claimant permanent restrictions which conformed with a functional capacities evaluation placing claimant in the light physical demand level. A lifting restriction of 20 pounds was imposed for lifting from floor to waist; 12 inches to waist; waist to shoulder and shoulder to overhead. Pushing was limited to 48 pounds and pulling limited to 42 pounds. Bilateral carrying was limited to 22.5 pounds. Occasional bending, stooping, squatting, kneeling, walking, reaching, climbing and standing with frequent sitting and hand controls.

Dr. Amundson rated the claimant in DRE Lumbosacral Category III for a 10 percent functional impairment rating. But the doctor further opined that 5 percent was preexisting. Finally, Dr. Amundson reviewed a task list prepared by Michael Dreiling, a vocational rehabilitation consultant, and opined claimant would be unable to perform 12 out of the 15 tasks for an 80 percent task loss.

The claimant still complains of constant pain in his low back as well as pain radiating down into his legs. He notes that he cannot either sit or stand for much longer that 15 to 20 minutes without the onset of pain which requires him to change positions.

Mark Gwaltney, respondent's president, testified that upon receiving claimant's permanent restrictions from Dr. Amundson he mailed a letter to claimant offering a full-time accommodated job paying $9.63 an hour and instructing claimant to report to work on a date certain. The job was described as organizing materials, maintaining inventory, light clean up and running errands for mechanics, as needed. Mr. Gwaltney further testified that if claimant had difficulty performing those duties further modification of the job tasks would have been made to accommodate claimant. Moreover, at the time of his deposition Mr. Gwaltney testified that the offer was still open if claimant was able to obtain transportation to the job.

In response to respondent's offer of accommodated employment, the claimant's attorney sent respondent's attorney a letter detailing the fact claimant had received the letter offering accommodated work on the same day that the letter directed him to report to work and that claimant did not have transportation to get to work. The attorney's letter further inquired whether Dr. Zimmerman's restrictions would be followed in the offered accommodated job and finally indicated claimant was willing to return to work for respondent but needed more time to find transportation.

Although claimant expressed a willingness to attempt the accommodated job if he could obtain transportation to work, he further noted that he did not think he could do the work and stay within his restrictions.

Michael Dreiling, a vocational rehabilitation consultant, met with claimant to develop a list of tasks claimant had performed in the 15-year period before his work-related accident. Mr. Dreiling developed a list of 15 tasks. He further opined that claimant retained the ability to earn a minimum wage.

At the request of claimant's attorney, Dr. Daniel D. Zimmerman examined claimant on June 7, 2005. At the examination the claimant complained of continued lumbosacral and lower extremity pain and discomfort. Using the range of motion model of the AMA

*Guides*[1], Dr. Zimmerman opined claimant suffered a 27 percent whole person functional impairment as a result of his work-related accident on February 12, 2003. Dr. Zimmerman concluded the range of motion model was necessary in this case because claimant had a two-level fusion which is not covered using the DRE model. Dr. Zimmerman imposed permanent restrictions of lifting 10 pounds occasionally and 5 pounds frequently. He further noted claimant should avoid frequent flexing of the lumbosacral spine and avoid frequent bending, stooping, squatting, crawling, kneeling and twisting. Finally, the doctor noted claimant should sit for no longer than 20 minutes and stand and walk for no longer than 10 to 15 minutes. Dr. Zimmerman reviewed the task list prepared by Michael Dreiling and opined claimant would be unable to perform 15 out of the 15 tasks for a 100 percent task loss.

On September 23, 2005, the ALJ entered an Order Referring Claimant For Independent Medical Evaluation with Dr. Peter V. Bieri. The doctor was directed to examine and evaluate claimant for a disability rating and make recommendations regarding future medical treatment. The doctor was also directed to impose restrictions and offer opinions regarding any preexisting impairment as well as loss of task performing ability.

In a report dated October 19, 2005, Dr. Bieri placed claimant in the DRE Lumbosacral Category V which results in a 25 percent whole person functional impairment. The doctor then noted claimant had previously been rated with a 17 percent whole person functional impairment as a result of a low back condition. Consequently, the doctor concluded claimant suffered an 8 percent whole person functional impairment as a result of the February 12, 2003 accidental injury. Dr. Bieri next noted that at the time of his examination the claimant was not under any active care nor was any specific treatment anticipated. Dr. Bieri imposed restrictions limiting claimant to occasional lifting of 20 pounds, frequent lifting not to exceed 10 pounds and negligible constant lifting. Sustained sitting or captive positioning should be limited to no more than two hours at a time with 15 minutes for postural adjustment. Stooping, bending, kneeling, crouching and crawling should be performed no more than occasionally. Applying those restrictions to the task list prepared by Michael Dreiling, Dr. Bieri opined claimant would be unable to perform 14 out of 15 tasks for a 93 percent task loss.

Respondent argues that claimant should be limited to the 5 percent functional impairment because he did not attempt to perform the accommodated job that would have paid more than 90 percent of his pre-injury wage.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The Kansas appellate courts, beginning with *Foulk*[2], have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his pre-injury wage at a job within his medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decisions is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.[3] Before claimant can claim entitlement to work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.[4]

Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[5] where the accommodated job violates the worker's medical restrictions,[6] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[7] The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

But it is claimant's burden to initially prove that he has made a good faith effort to obtain or retain appropriate employment. Generally, the published cases consider it the claimant's burden to show good faith. In *Cavender*[8] it was determined claimant met his burden of showing good faith effort to find appropriate employment. Likewise, it was stated in *Oliver*[9] that claimant met his burden of good faith under *Foulk* and *Copeland.* It is only after the claimant has met his initial burden of proof regarding good faith that the burden of proof may shift to the employer if the employer contests the claimant's continuing good

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[6] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[7] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[8] *Cavender v. PIP Printing, Inc.*, 31 Kan. App. 2d 127, 61 P.3d 101 (2003).

[9] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 78, 977 P. 2d 288, *rev. denied* 267 Kan. 889 (1999).

faith efforts to find appropriate employment after the workers compensation regular hearing.[10]

In this instance the respondent offered claimant accommodated employment that paid more than 90 percent of his pre-injury average weekly wage. Claimant argues that it was not a lack of good faith that prevented his attempting the offered job, instead, he notes he was simply unable to get to and from work because of a lack of transportation.

In Swickard[11] the claimant was offered accommodated work but on a different shift. Claimant did not accept the offer because of transportation problems. Claimant and her husband worked in cities other than where they resided and only had one car. Because of her husband's work schedule, claimant could not get to work during the first shift. The ALJ limited claimant's award to her functional impairment because she failed to attempt the accommodated work offered by respondent. The Board affirmed and on appeal the Court of Appeals affirmed the Board, holding claimant's reason for not attempting the proffered accommodated job was due to her transportation problem which was unrelated to her physical ability to perform the offered job and respondent was not required to make unusual efforts to accommodate claimant's transportation problems.

In *Parsons*[12] claimant worked for respondent near Hugoton, Kansas. After claimant was released with permanent restrictions following treatment for her work-related injury, the respondent offered her work as a night security guard at its plant approximately 40 to 45 miles away in Guymon, Oklahoma. Claimant did not accept the offer because of her fear of being on the road at night and she noted she had an older car that she did not think would hold up to the 90 miles a day. The ALJ and Board determined claimant's refusal of the offered accommodated job was reasonable and awarded a work disability. The Court of Appeals affirmed and held the factfinder may weigh factors other than the physical demands of the offered job in the determination whether claimant demonstrated good faith rejecting an offer of accommodated work.

In *Ford*[13] the claimant refused an offer of accommodated employment because he had moved 60 miles away from respondent's business location so he could live rent free and he was also without transportation as he was unable to repair or procure another vehicle because he was without a job or money. The ALJ concluded respondent took an unusual amount of time to make the offer of accommodated work and because claimant had relocated and was without transportation it was not unreasonable for claimant to

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[10] *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 59 P.3d 352 (2002).

[11] *Swickard v. Meadowbrook Manor*, 26 Kan. App. 2d 144, 979 P.2d 1256 (1999).

[12] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

[13] *Ford v. Landoll Corp.*, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied* 269 Kan. 932 (2000).

refuse the offer. The Court of Appeals reviewed the Board's affirmance of the ALJ's work disability award and distinguished *Swickard* noting in that case there was no factual finding the employer had contributed to the workers transportation problem or had dealt with the worker in bad faith. In *Ford*, the ALJ determined respondent had unreasonably delayed the offer of accommodated work. Accordingly, the Court affirmed the award of work disability and determined that where the worker does not accept an offer of accommodated work due to transportation problems, the statutory presumption of no work disability is not invoked where the employer has contributed to the workers transportation problems or dealt with the worker in bad faith.

In this case the claimant did not attempt the offered accommodated work because he had no transportation and alleged he lost his vehicle because he was unable to make car payments while on temporary total disability compensation. Those benefits were substantially less than what claimant was earning before his accidental injury. And claimant did not think he would be able to perform the offered work due to his limitations, but was nonetheless willing to give it a try if he could resolve his lack of transportation. Claimant further argues that he approached respondent about advancing the minimum functional impairment compensation so he could purchase transportation. Conversely, respondent notes that its business location is only 6 to 8 miles from where claimant lives with his mother and that claimant seemingly has transportation available to visit his sister, his attorney as well as doctors. As to the advance payment of the undisputed minimum functional impairment, respondent argued the amount of functional was in dispute at the time claimant made his request as the preexisting impairment ratings were potentially more than the treating doctor's rating.

It is undisputed claimant suffered a work-related injury and has significant permanent restrictions. While unable to work during his medical treatment claimant's income was limited to his temporary total disability compensation which was not sufficient to allow him to make payments on his car and he was forced to relocate and live with his mother. Now he has no transportation other than borrowing his mother's vehicle and his testimony was that she did not want him using the car to daily commute to work. Like, *Ford*, in this case the respondent's offer of accommodated employment was suspect. The respondent's original offer of accommodated employment was returned by the post office to respondent without being delivered and respondent then enclosed a copy of that letter in a letter dated August 23, 2005 sent to claimant's counsel. The August 23, 2005 letter requested claimant's counsel to contact claimant and ask him to report to work the next day. Claimant's attorney responded in a letter dated August 24, 2005 requesting more time for claimant to locate transportation to work and asked whether Dr. Zimmerman's restrictions would be followed in the proposed accommodated job. The letter noted in pertinent part:

> I am in receipt of your client's offer of accommodated work. I received the letter sometime on August 23, 2005 from Juanita Holbrook requesting he report to work on August 24, 2005 at 6:00 a.m. and that the job would be within the restriction

> issued by Dr. Amundson. As you may know, Mr. Miller has no vehicle which is why he needed a rental vehicle for each doctor appointment. Mr. Miller lost his car and home as a result of this work injury. Additionally, the letter from the employer makes no mention of the restrictions issued by Dr. Zimmerman and whether those restrictions will also be honored. Mr. Miller is ready and willing to return to work for the respondent, but he has no income and has been off work since February of 2003. Mr. Miller is in the process of attempting to find some mode of transportation to work, but he must be given more than one day's notice to acomplish this task.[14]

Respondent did not respond to this letter. Consequently, it cannot be said claimant's actions demonstrated a lack of good faith in not attempting the proposed offer of an accommodated job. Accordingly, the wage respondent would have paid claimant in the accommodated job will not be imputed to claimant.

Although the claimant's inability to attempt the offered job did not indicate a lack of good faith, that does not end the inquiry.[15] The evidence regarding claimant's attempts to find employment is limited to his assertion that he has been unable to find work. No evidence was offered as to his job search efforts. The Board concludes claimant did not otherwise demonstrate a good faith effort to find appropriate employment. Michael Dreiling, a vocational rehabilitation consultant, testified claimant retained the ability to earn a minimum wage. The Board will impute the minimum wage of $5.15. This results in a 51 percent wage loss.

Turning to the task loss component of the work disability formula, the Board notes that the ALJ adopted Dr. Amundson's opinion regarding claimant's functional impairment as the most persuasive. The Board agrees and for that same reason finds Dr. Amundson's restrictions and resulting opinion regarding claimant's task loss as the most persuasive. Consequently, the Board finds the claimant's task loss is 80 percent. Combining claimant's 51 percent wage loss with the 80 percent task loss results in a 65.5 percent work disability.

The claimant testified that his doctor recommended additional medical treatment consisting of pain management. In his letter to the respondent dated August 24, 2005, claimant's attorney noted claimant requested a pain management specialist for his ongoing low back and leg pain. As respondent did not designate a physician to provide pain management, it was appropriate for the ALJ to designate a physician to provide that service. The Board affirms the ALJ's designation of the physician to provide pain management.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney.

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[14] R.H. Trans., Ex. 1.

[15] See *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P. 3d 591 (2000).

K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

## AWARD

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 30, 2006, is modified to reflect claimant suffered a 65.5 percent work disability and affirmed in all other respects.

The claimant is entitled to 107 weeks of temporary total disability compensation at the rate of $280.03 per week or $29,963.21 followed by 211.57 weeks of permanent partial disability compensation at the rate of $280.03 per week or $59,245.95 for a 65.50 percent work disability, making a total award of $89,209.16.

As of October 18, 2006, there would be due and owing to the claimant 107 weeks of temporary total disability compensation at the rate of $280.03 per week in the sum of $29,963.21 plus 85 weeks of permanent partial disability compensation at the rate of $280.03 per week in the sum of $23,802.55 for a total due and owing of $53,765.76, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $35,443.40 shall be paid at the rate of $280.03 per week for 126.57 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this _____ day of October 2006.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Neil A. Dean, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge